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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

NORTH BAY DEVELOPMENT DISABILITIES SERVICES, INC., D/B/A NORTH BAY REGIONAL CENTER,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF KAREN FULLER, EMPLOYEE, IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF KAREN FULLER, EMPLOYEE, IN SUPPORT OF PETITIONER

INTRODUCTION

Pursuant to Rule 37.2 of the Rules of this Court, Karen Fuller ("Ms. Fuller"), an employee, submits this brief *amicus curiae* in support of the petitioner, North Bay Development Disabilities Services, Inc., d/b/a North Bay Regional Center ("North Bay"), at relevant times her employer, urging reversal of the decision of the United States Court of Appeals for the District of Columbia Circuit. The petitioner and the respondent have consented to the filing of this brief, and their consent letters accompany this brief.

INTEREST OF THE *AMICUS CURIAE*

Ms. Fuller was, at relevant times, an employee of North Bay. North Bay had recognized the Service Employees International Union, Local 535 ("Local 535") as the "exclusive representative" under § 9(a) of the National Labor Relations Act[1] for the purposes of collective bargaining over the terms and conditions of employment of employees in a defined bargaining unit. One of the terms and conditions of employment to which North Bay and Local 535 had agreed was the Agency Shop provision which is the subject of the present litigation, and which made the required payments a condition of the employees' employment.[2]

That Agency Shop provision was a term and condition of Ms. Fuller's employment. Ms. Fuller objected to paying Local 535 more than could be required under applicable law. As she could have been terminated from employment for noncompliance with the Agency Shop provision, despite her objections to excessive payments, that provision established her rights and obligations in the first instance. She, therefore, has an interest in submitting this brief *amicus curiae* to state the views of employees with respect to the issues presented by the instant petition.

Specifically, Ms. Fuller is concerned with what she believes are the plainly erroneous conclusions and rulings of the court of appeals which vitally impact upon employees' freedoms, namely that:

- No employee objected to the imposition of the dues-equivalent Agency Shop with its potential for excessive exactions;

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[1] 29 U.S.C. § 159(a) (West 1990).

[2] "Agency Shop" will herein refer to those agency shop provisions which on their face require employees who *are not* members of the union to pay amounts equivalent to a voluntary member's dues as a condition of their employment, both generally and as to the North Bay/Local 535 agreement.

• the amount of fees an employee must pay under an Agency Shop is *not* a mandatory subject of bargaining, despite this Court's decision in *General Motors*;[3]

• the Agency Shop is privileged by the proviso to § 8(b)(1)(A)[4] as being within the "right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership," despite the impact of the Agency Shop upon *nonmembers* and this Court's decisions in *Beck*[5] and *Pattern Makers*.[6]

In addition, because of the severe analytical and practical difficulties presented by the decision of the court of appeals, Ms. Fuller urges the Court to grant certiorari and consider whether the negotiation of an Agency Shop provision which either does not accurately inform bargaining unit employees of their financial obligations to the union, or which actively misleads employees as to those financial obligations, is an illegal subject of bargaining.

SUMMARY OF ARGUMENT

The decision of the court of appeals cannot be squared with this Court's decision in *General Motors*[7] establishing the requirement that parties negotiating collective bargaining agreements must, as a mandatory subject of bargaining, bargain over nonmembers' financial obligations to the union. *General Motors* has been universally interpreted and applied to make the Agency Shop, in which nonmembers must pay amounts equal to a

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[3] *NLRB v. General Motors*, 373 U.S. 734 (1963) (*"General Motors"*).

[4] 29 U.S.C. § 158(b)(1)(A) (West 1990).

[5] *Communications Workers v. Beck*, 487 U.S. 735 (1988) (*"Beck"*).

[6] *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985) (*"Pattern Makers"*).

[7] 373 U.S. 734 (1963).

voluntary member's dues, facially valid, even where employees object to paying no more than the law requires. However, *General Motors* did not anticipate and address how that bargaining obligation is affected—or, indeed, limited—by the rights of nonmember employees under the general "policy of voluntary unionism" expressed in *Pattern Makers*.[8] Neither did *General Motors* anticipate and address how that bargaining obligation is affected, and most assuredly limited, by *Beck*,[9] to a requirement that nonmember employees pay not a dues-equivalent amount, but a fee to defray the union's costs of collective bargaining.

This case, Ms. Fuller submits, provides an excellent record which precisely frames the issues we believe this Court should address in light of *Beck* and *Pattern Makers*. The contradiction between *General Motors* and *Beck* leaves a vast discrepancy between those Agency Shop provisions in the mass of collective bargaining agreements, which on their face purport to require dues-equivalent payments, and the fact that *Beck* stands as unequivocal precedent prohibiting such agreements. What is needed by the National Labor Relations Board, the courts, employers, unions, and employees, is for this Court to explicitly interpret *General Motors* in light of *Beck*. For, unless this Court intervenes, dues-equivalent obligations will perpetually be imposed upon nonmembers, as a practical matter, in anachronistic (and even disingenuous) reliance upon *General Motors*, simply because *Beck* addressed Agency Shop provisions from the standpoint of employee rights and the "policy of voluntary unionism," rather than from the standpoint of the bargaining obligations of unions, such as Local 535, and employers, such as North Bay. Certiorari is warranted to reconcile the bargaining obligations of unions and employers under *General Motors* with employee freedoms under *Beck*.

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[8] 473 U.S. 95, 104-05 (1985).

[9] 487 U.S. 735 (1988).

ARGUMENT

Employee Objection to the Agency Shop

The court of appeals erroneously concluded that the existence of an employee objecting "to the amount of the fee to be withheld [is] a feature notably absent from this case."[10] It also erroneously concluded that the petitioner was attempting to "appoint itself the representative of some hypothetical non-union employees who may object to the amount of the agency fee set by the union."[11] Nothing could be further from the truth.

In fact, Ms. Fuller was an employee who objected "to the amount of the fee to be withheld"; thus, there was an *actual* employee, with an *actual* objection, for North Bay to be concerned about, and no need at all to concoct "some hypothetical non-union employees who *may* object to the amount of the agency fee set by the union."[12]

Ms. Fuller's objection appears throughout the record in this case, both before the National Labor Relations Board ("NLRB") and the court of appeals. First, while the case was pending before the NLRB on North Bay's motion for reconsideration, Ms. Fuller filed a motion to intervene and a brief as intervenor in support of reconsideration.[13] Ms. Fuller's motion to intervene was denied by an Order of the NLRB.[14]

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[10] See Petitioner's Appendix ("App. __") at 6a.

[11] *Id.*

[12] *Id.* (emphasis added).

[13] These documents are contained in the administrative record in this case, and were filed under certificate of service dated May 24, 1988.

[14] Order dated June 23, 1988, by direction of the NLRB, per Joseph E. Moore, Deputy Executive Secretary (App. at 26a).

Second, Ms. Fuller filed a petition for review of the NLRB's decision with the United States Court of Appeals for the District of Columbia Circuit, obviously the same court which issued the decision of concern in the instant case.[15] The petition sought review of the NLRB's denial of Ms. Fuller's motion to intervene and of the merits of the NLRB's decision on the complaint before it. The court of appeals dismissed Ms. Fuller's petition as to the merits of the NLRB's decision on grounds that she was not a "person aggrieved under 29 U.S.C. § 160 (f)," and ordered Ms. Fuller to show cause why the denial of intervention "should not be summarily affirmed."[16] Because of the court of appeals' ruling on the merits, Ms. Fuller sought leave to withdraw her petition insofar as it addressed intervention, which was granted.

In addition, while the instant case was pending in the court of appeals, Ms. Fuller sought to protect her interests by filing an *amicus* brief, to which both North Bay and the NLRB consented. Despite that consent and the actual filing of the brief, Ms. Fuller's *amicus* brief was rejected by the court of appeals under a local rule.[17]

Ms. Fuller does not here contest the validity of the decisions of the NLRB or the court of appeals in these instances. She recites this history to show that there is *no* basis in fact for the court of appeals' stated conclusions in the decision below that an objecting employee was "notably absent" from the case, and that, in asserting employees' rights before the court, North Bay was abstractly representing the interests of "some hypothetical non-union employees who may object to the amount of the agency fee

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[15] Ms. Fuller's petition for review was filed as *Fuller v. NLRB*, No. 89-1269 (D.C. Cir. filed Apr. 25, 1989).

[16] *Fuller v. NLRB*, No. 89-1269 (D.C. Cir. Aug. 15, 1989).

[17] The brief was rejected as untimely under the court of appeals' Rule 11 (e) (4) which requires an *amicus* to file the parties' consent or a motion for leave to file a brief within thirty days of the docketing of the case with the court. Ms. Fuller acknowledges that such action was not taken within the time required.

set by the union." The court of appeals was in error in reaching these unsupportable conclusions, conclusions which appear seriously to have affected (or even infected) the outcome of the court's deliberations. Therefore, this Court should examine the record, reasoning, and decision of the court of appeals *de novo*, without according the usual deferential review.

Agency Shop Fees and Bargaining

The court of appeals reached a series of erroneous conclusions resulting in the ultimate judgment that Agency Shop fees are *not* a mandatory subject of bargaining under this Court's decision in *General Motors*.[18] First, it concluded that Agency Shop requirements are akin to the "right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership"[19] found in the proviso to § 8(b)(l)(A) of the NLRA.[20] Ms. Fuller does not question the existence of labor organizations' right to prescribe rules for members under that section of the NLRA. She submits, however, that the right of a union to impose restrictions on the "acquisition or retention of membership" has no bearing whatsoever on the rights of nonmembers, such as Ms. Fuller, to be free from compulsory unionism.

The § 8(b)(1)(A) proviso was raised by the union in *Pattern Makers*.[21] There, the union claimed that the proviso allowed it to restrict the right of employees to resign from membership. This Court explicitly rejected that view of the proviso, saying, "[n]either the [NLRB] nor this Court has ever interpreted the proviso

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[18] *NLRB v. General Motors*, 373 U.S. 734 (1963).

[19] App. at 4a.

[20] 29 U.S.C. § 158(b)(1)(A) (West 1990).

[21] *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985).

as allowing unions to make rules restricting the right to r sign."[22] Clearly, if the proviso cannot be employed by the uni to retain unwilling employees as members, it cannot be employe either, to justify unilateral union control over Agency Shop fe nonmembers must pay as a condition of their employment. Fo in both cases, the paramount consideration is the "policy voluntary unionism" implicit in § 8(a)(3).[23]

The court of appeals also concluded that "this is not a ca of [the] character" in which the union's enforcement of the fe "affects employment status."[24] The court similarly conclude that "the amount of an agency fee concerns primarily th relationship between the union and the non-member employee it is not 'an aspect of the relationship between the employer an employees.'"[25] In reaching these conclusions, the court ove looks or ignores the language of the North Bay/Local 535 Agen Shop, itself, the language of § 8(a)(3) of the NLRA, this Court relevant decisions in *Beck*[26] and *Hudson*[27], and the importance the language contained in Agency Shops to the practical achiev ment of the "policy of voluntary unionism."

The North Bay/Local 535 Agency Shop

The relevant North Bay/Local 535 bargaining agreeme provides:

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[22] *Id.* at 108.

[23] *Id.* at 104. Section 8(a)(3) is found in 29 U.S.C. § 158(a)(3) (West 199

[24] App. at 4a.

[25] *Id.*

[26] *Communications Workers v. Beck*, 487 U.S. 735 (1988).

[27] *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986) ("*Hudson*").

> Agency Shop. *Each employee* covered by this Agreement who is hired after September 12, 1986 *shall, as a condition of continued employment*, within thirty (30) days of first employment at the Center, either 1) become and remain a member in good standing of the Union, or 2) commence and continue to make payment(s) of an amount equal to the Union's periodic dues and initiation fees to the Union as a service fee for Union representation, except such amount shall not exceed that amount as outlined or required by the pertinent case law.
>
> The parties agree to meet and develop language to be included in this agreement concerning the amount of Agency fee to be paid in lieu of Union dues by persons in the unit who do not belong to the Union. The parties agree to be bound by the relevant U.S. Supreme Court Decisions on the subject. Such discussions shall be held during the months of November and December, 1986 and resolution shall be attained by December 31, 1986 or the issue shall be submitted to an arbitrator from a panel supplied by the American Arbitration Association (AAA). (Emphasis added.)

As is plain on the face of this language, nonmember employees, such as Ms. Fuller, must make the payments required, *as a condition of their employment*. Thus, there is no basis in fact for the court of appeal's finding that "this is not a case of [the] character" in which the agreement, its enforcement, or the potential for its enforcement "affects employment status." The quoted language, particularly the "condition of employment" requirement, clearly and unequivocally "affects employment status," and the court of appeals was simply wrong in concluding otherwise.

Section 8(a)(3)

The court of appeals' conclusion, noted above, that "the amount of an agency fee concerns primarily the relationship

between the union and the non-member employees; [and]it is not 'an aspect of the relationship between the employer and employees,'" is reached in defiance of the North Bay/Local 535 Agency Shop provisions quoted above, as well as § 8(a)(3) of the NLRA. It is clear that the parties' Agency Shop requires involuntary employee payments as a "condition of their employment." The "condition of employment" language is always and everywhere understood to mean that an employee, such as Ms. Fuller, who fails to comply *will be discharged from employment.* Obviously, the employee is an employee of the employer, not the union. Just as clearly, only the employer (not the union) can discharge the employee from employment. Thus, contrary to the court of appeals, the existence of an Agency Shop, such as the one here, is "an aspect of the relationship between the employer and employees."

The plain language of § 8(a)(3) supports this conclusion. The existence of the Agency Shop is privileged only because of this Court's conclusion that the language of the section is construed to mean that nonmember employees must pay to defray the union's costs of negotiating and enforcing the applicable collective bargaining agreement.[28] The section, on its own terms, imposes obligations on *employers* not to violate employees' rights.[29] The fact that the very section of the statute authorizing Agency Shops pertains to employers completely undermines the court of appeals' view that such arrangements are "not an aspect of the relationship between the employer and employees."

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[28] This negotiation and enforcement function is commonly referred to as "collective bargaining, contract administration, and grievance adjustment." *Communications Workers v. Beck*, 487 U.S. 735, 745 (1988).

[29] The union violations most frequently linked with employers' § 8(a)(3) violations are in an entirely different section of the NLRA, the 8(b) series, namely § 8(b)(1)(A) (union actions which restrain or coerce employees) and § 8(b)(2) (union attempts to cause employer discrimination under § 8(a)(3)). Section 8(b)(1)(A) and § 8(b)(2) of the NLRA are, respectively, 29 U.S.C. § 158 (b)(1)(A) and § 158(b)(2) (West 1990).

Beck/Hudson

This Court has addressed the "policy of voluntary unionism" as it affects Agency Shops in a series of cases beginning with *Machinists v. Street.*[30] The two most recent decisions which apply that "policy" to define the limits of nonmembers' obligations under Agency Shops are *Hudson*,[31] which sets forth substantive limitations and procedural protections in the public-sector, and *Beck*,[32] stating the substantive limitations in the private-sector. *Hudson* holds that "*the government* and union have a responsibility to provide procedures that minimize that impingement [the Agency Shop makes on employees First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights."[33] *Beck* is even more apposite here; it makes plain that the Court "granted certiorari to resolve the important question concerning the validity of such [employer/union Agency Shop] agreements,"[34] that "§ 8(a)(3) places [limits] on *the negotiation* and enforcement of [Agency Shops],"[35] and that "the rationale underlying § 8(a)(3) [is to] prohibit[ ] the collection of fees that are not germane to representational activities."[36] The emphasis this Court has placed in these cases upon the *negotiation* of provisions of the bargaining agreement and proscriptions upon excessive *collections* clearly implicates employers, for without the employers there would be

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[30] 367 U.S. 740 (1961).

[31] *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986).

[32] *Communications Workers v. Beck*, 487 U.S. 735 (1988).

[33] 475 U.S. at n.20 (emphasis added). In *Hudson*, of course, "the government" is the employer.

[34] 487 U.S. at 741-42.

[35] *Id.* at 745 (emphasis added).

[36] *Id.* at 760.

no negotiations, and without Agency Shops there would be not even the potential for excessive exactions or collections from unwilling employees.[37]

Practical Achievement of Voluntary Unionism

This Court has said that § 8(a)(3) "provide[s] only the most grudging authorization of such [Agency Shop] agreements."[38] That conclusion appears to us entirely consistent with, and, indeed, the fulfillment of, the "policy of voluntary unionism" contained in the NLRA.[39] However, if the circuit court's decision below stands, the limitations in the statutory authorization for Agency Shops and the policy of voluntary unionism will not simply be diminished, but will be nullified outright.

The problems are practical. First, the "condition of employment" language threatens the very working lives of the employees involved. The sanction is "industrial capital punishment" imposed for no reason connected with the employees' ability, experience, or willingness to perform diligent work. Second, the "condition of employment" language threatens this sanction with no prior judicial determination of the validity of the amount of the fee demanded.[40] But perhaps most fundamentally, the "condition of employment" language, coupled with the "dues-equivalent" Agency Shop language which appears on the face of the agreement, gives every union officer and shop steward written substan-

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[37] We assume that under the "policy of voluntary unionism," nonmembers would always be free to contribute funds to the union which exceed the collective bargaining charge under *Beck*. The point here, however, is that contributions above the *Beck* amount cannot be compelled by employer/union Agency Shops which are negotiated or enforced under § 8(a)(3).

[38] *Communications Workers v. Beck*, 487 U.S. 735, 755 (1988).

[39] *Pattern Makers' League v. NLRB*, 473 U.S. 95, 105 (1985).

[40] Loss of employment in such circumstances is "irreparable harm" in every practical sense.

tiation for demands for the exaction and collection of fees which are excessive, and potentially even grossly excessive, under *Beck*, *Hudson*, and related precedents.[41]

There is, then, no reason in the NLRA, this Court's decisions, or practical wisdom for the decision below. As shown, that decision undermines the basic policies of the NLRA as declared by this Court.

Illegal Bargaining Subject

Ms. Fuller has here stated, in unequivocal terms, her conclusion that the decision below cannot be squared with this Court's precedents. Nevertheless, she shares, for the general case, the concern the court of appeals has for the possibility that "the resulting [Agency Shop] figure [will] reflect the parties' relative bargaining strengths rather than the amount chargeable [under *Beck*] by some objective standard."[42] She is mindful that many, if not most, employers will not endeavor, as North Bay did, to protect employees' *Beck* rights. For, in general, the Agency Shop language which results from the negotiating process does *not* reflect the "amount chargeable by some objective standard," but instead reflects the fact that when Agency Shop provisions are negotiated, nonmembers are not represented at all, and that in the process a company is "giving up what it valued least while the union was getting what it wanted most."[43]

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[41] Nowhere is that problem more clearly illustrated than the instant case in which an arbitrator concluded that employees must pay dues-equivalent amounts, despite the limitations contained in the North Bay/Local 535 Agency Shop. *In re Service Employees Int'l Union & North Bay Regional Center*, AAA Case No. 74-30-0010-87 (1987) (Concepcion, Arb.) ("Each employee covered by this Agreement...shall...commence and continue to make payment(s) of an amount equal to the Union's periodic dues and initiation fees to the Union.")

[42] App. at 5a.

[43] Bradley, *The Freedom of the Individual under Collectivized Labor Arrangements*, in The Public Stake in Union Power 152 (P. Bradley ed. 1965).

Thus, the court of appeals' goal that the Agency Shop fee result from an "objective standard" is *not* dealt with by the court's decision.[44] Indeed, the result below mistakenly perpetuates dues-equivalent Agency Shops in outright defiance of *Beck* and the very concern that the court itself stated. More alarming is the fact that if the court of appeals' decision stands, an "objective standard" will, in all probability, almost never be employed in the language of Agency Shop provisions. The most likely result—and one which is the exact opposite of what the court of appeals intended—is that the language of such provisions will continue to reflect many factors other than an "objective standard," including the very factor the court of appeals intended *not* play any role in negotiating Agency Shop provisions, namely the "relative bargaining strengths" of the parties.

CONCLUSION

The foregoing reasons fully warrant this Court's consideration of the issues raised by this case on certiorari. Ms. Fuller supports certiorari because present practice regarding dues-equivalent Agency Shop provisions subverts employees' general rights under the "policy of voluntary unionism" and their particular rights under *Beck* to pay no more than their *pro rata* share of collective bargaining costs to the union which is their exclusive representative. This practice, to a large extent, occurs because this Court's decisions in *Beck* and *Pattern Makers* do not explicitly address the implications of those cases for employer/union collective bargaining obligations where Agency Shop provisions are concerned. To remedy this untenable situation, which daily and repeatedly results in the negotiation and enforce-

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[44] *Compare Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1000 (9th Cir. 1970). ("[T]he limitation asserted here does in fact constitute an implied term of the contract.")

ment of Agency Shop provisions which cause the forfeiture of employees' rights, this Court should grant certiorari. Briefs on the merits, we respectfully suggest, should assist the Court in reconciling employer/union bargaining obligations to employees' rights to "voluntary unionism" under *Beck*.

Respectfully submitted,

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